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No. 510.

# In the Supreme Court

## of the United States

**OCTOBER TERM, 1941**

C. H. COCHRAN, *Appellant*,

*vs.*

THE STATE OF KANSAS, and MILTON F. AMRINE, Warden of the Kansas State Penitentiary, *Appellee*.

*Appeal from the Supreme Court of the State of Kansas*

## Motion to Dismiss and Brief in Support Thereof

MILTON F. AMRINE, Warden of the Kansas State Penitentiary,
By JAY S. PARKER, Attorney General of Kansas,
JAY KYLE, Asst. Att'y General of Kansas,
*Attorneys for Appellee.*

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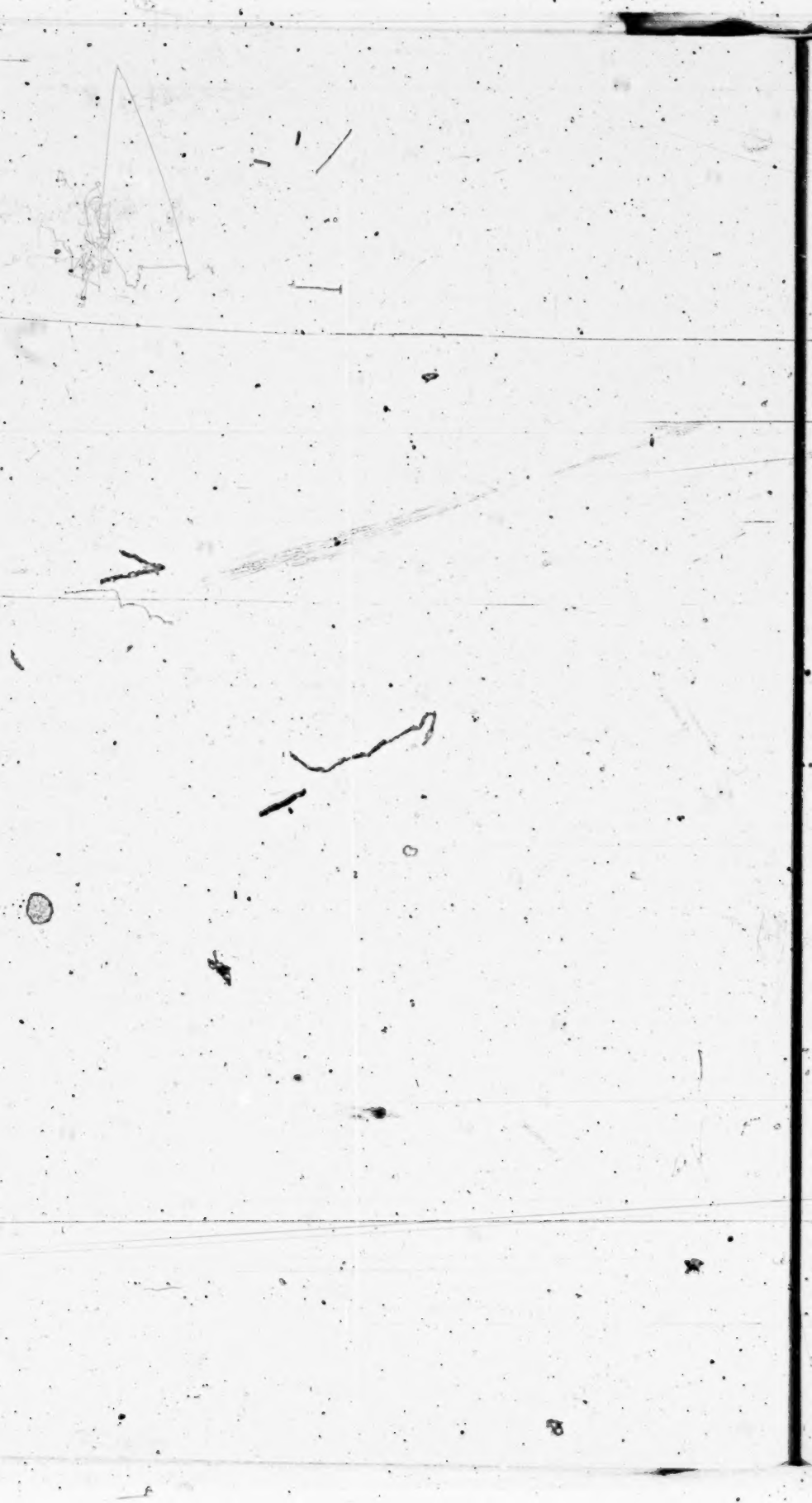

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## Motion to Dismiss and Brief in Support Thereof

### MOTION TO DISMISS

Comes now Milton F. Amrine, warden of the Kansas State Penitentiary, for and on behalf of the state of Kansas, and as warden of the Kansas State Penitentiary, appellee in the above-entitled cause, and moves the court to dismiss the appeal therefrom for the following reasons, to wit:

I

Because there is no substantial federal question involved in such appeal.

II

Because there has not been a compliance with Rule 38, paragraph 2, or with Rule 12, paragraph 1, of this court by the appellant.

MILTON F. AMRINE, Warden of the Kansas,
State Penitentiary,
By. JAY S. PARKER, Attorney General of Kansas,
JAY KYLE, Asst. Att'y General of Kansas,
*Attorneys for Appellee.*

## BRIEF IN SUPPORT OF APPELLEE'S MOTION TO DISMISS APPEAL

The appellee filed motion to dismiss the appeal in the above-entitled cause under authority of Rule 12, paragraph 3, of the supreme court of the United States.

It is not the contention of the appellee that this court does not have jurisdiction to grant the writ of certiorari nor hear the appeal filed by the appellant in this case. The appellee's first contention is that the appeal should be dismissed because there is no substantial federal question involved.

U. S. Code, Ann., Title 28, sec. 344 (Judicial Code, sec. 237).

In order to present this brief in support of the motion to dismiss, it is considered necessary to briefly set out a concise and direct statement of facts, which has been carefully omitted in the petition for a writ of certiorari and brief in support thereof filed by the appellant in this action pursuant to Rule 38, paragraph 2, and Rule 12, paragraph 1, of this court.

C. H. Cochran, appellant herein, was charged in a complaint in writing filed before a justice of the peace in Sumner county, Kansas, in December, 1932, on one count of forgery on a described check, and a separate count with

uttering the same check in Sumner county, Kansas. A warrant, which was issued on this complaint, was delivered to the sheriff of Sumner county, Kansas, on April 12, 1933, who arrested the appellant in an adjoining county and returned him to Sumner county. On April 20, 1933, a preliminary examination was held before the justice of the peace, at which time appellant appeared in person and by his attorney, and being bound over for trial to the district court, an information was duly filed charging the same offenses charged in the warrant. The trial came regularly on for hearing in the district court of Sumner county, Kansas, on May 15, 1933; a verdict of guilty by the jury was returned upon the second count, and on May 20, 1933, the appellant's motion for a new trial and his motion for arrest of judgment were considered and overruled.

On May 29, 1933, following presentation of evidence by the county attorney, the district court of Sumner county found that the appellant had previously been convicted of two other separate and distinct felonies, and under the habitual criminal act of Kansas, was sentenced to life imprisonment in the Kansas State Penitentiary.

At all stages of the proceedings above narrated, from the date of the preliminary hearing to the sentence, in-

clusive, the appellant was present in person and with his counsel. No appeal was taken from the conviction and sentence and no appeals were taken from the denial of motion for a new trial and motion for arrest of judgment.

The appellant was incarcerated in the state penitentiary at Lansing on May 31, 1933. In October, 1935, the appellant filed a petition for a writ of habeas corpus in the supreme court of Kansas. The petition was considered and denied by the supreme court of Kansas in the case of *Cochran v. Simpson*, 143 Kan. 273, 53 P. 2d 502. Subsequently a second petition for writ of habeas corpus was filed in the Kansas supreme court, No. 33075, which was denied April 20, 1936, without a written opinion. Since then the appellant has filed several other applications for writs of habeas corpus, including two in the United States district court for the district of Kansas, one or more in the district court of Leavenworth county, Kansas, and has made applications of some nature to the district court of Sumner county, Kansas. The appellant filed a third application for a writ of habeas corpus in an original action in the supreme court of Kansas on January 8, 1941, and also filed a notice of appeal from a denial of an application for a writ from the district court of Leavenworth county, Kansas, on January 2, 1941. This

original application was considered and denied in the case of *Cochran v. Amrine*, 153 Kan. 777, 113 P. 2d 1048, and the appeal from the district court of Leavenworth county was dismissed in the same opinion for the reason that the appeal was not perfected. In this opinion the supreme court of Kansas took cognizance of the fact that the petitioner had filed many applications for various writs in several courts, including the first application which was filed before that tribunal in 1935 and reported in *Cochran v. Simpson*, supra. The grounds the appellant advanced in *Cochran v. Simpson*, supra, were not all identical with the ones in *Cochran v. Amrine*, supra, which is the basis of this appeal, although some of the allegations were repeated from the earlier case.

In the case of *Cochran v. Amrine*, supra, the Kansas court said in syl. 1:

> "While courts are liberal in entertaining petitions in habeas corpus proceedings, questions once fully considered and determined, in the absence of changed circumstances, should be regarded as settled."

and the second syllabus reads as follows:

> "The records of course are not set aside upon the unsupported statements of a defeated litigant."

The appellant alleged in his application in the case of *Cochran v. Amrine*, supra, that he had made some vague effort to appeal from his conviction and sentence from the district court of Sumner county, Kansas, in 1933. Neither the records of the district court of Sumner county, Kansas, nor the supreme court of the state of Kansas, nor the Kansas State Penitentiary sustained such allegations.

The supreme court of Kansas said in the case of *Cochran v. Amrine*, supra:

> "There is nothing in the record to indicate that the petitioner attempted to appeal his case to the supreme court. There is nothing in the record of the proceedings in the court below to indicate any irregularity in the petitioner's trial and conviction, and certainly nothing to indicate that his commitment was void for any reason. (p. 779.)

The court further said in this opinion:

> "Some of the questions sought to be raised in this proceeding were presented to the court at that time (*Cochran v. Simpson*, 143 Kan. 273, 53 P. 2d 502). All of them might have been and should have been presented in that proceeding. While a court should be liberal in entertaining habeas corpus proceedings, there is no reason to reconsider the same questions repeatedly. . . . No evidence has been offered to support these allegations other than the bare statement of the pe-

titioner. The records of the court are not set aside upon the unsupported statements of a defeated litigant." (p. 779.)

The appellee respectfully submits that such ruling is in full accord with the case of *Wong Doo v. United States*, 265 U. S. 239, which reads in part:

> "It therefore must be held that in this case the courts below erred in applying the inflexible doctrine of *res judicata*. But it does not follow that the judgment should be reversed; for it plainly appears that the situation was one where, according to a sound judicial discretion, controlling weight must have been given to the prior refusal. The only ground on which the order for deportation was assailed in the second petition had been set up in the first petition. The petitioner had full opportunity to offer proof of it at the hearing on the first petition; and, if he was intending to rely on that ground, good faith required that he produce the proof then. To reserve the proof for use in attempting to support a later petition, if the first failed, was to make an abusive use of the writ of habeas corpus. No reason for not presenting the proof at the outset is offered. . . . (p. 241.)

In the case of *Salinger v. Loisel*, 265 U. S. 224, this court laid down the following rule:

> "In practice the rules we here have outlined will accord to the writ of habeas corpus its recognized status as a privileged writ of freedom, and yet make against an abusive use of it. As a further

> safeguard against abuse the court, if not otherwise informed, may on receiving an application for the writ require the applicant to show whether he has made a prior application and, if so, what action was had on it." (p. 232.)

The appellee here is maintaining, and it is respectfully contended that the supreme court of Kansas adhered to the view that the appellant herein had had a full and complete hearing on his application for a writ of habeas corpus in the case of *Cochran v. Simpson*, supra, and that in accord with the opinion in the case of *Wong Doo v. United States*, supra, there was full opportunity to offer proof at the hearing on his first petition of the allegations which he has set up in subsequent applications for writs of habeas corpus. All of the allegations that were considered by the supreme court of Kansas in *Cochran v. Amrine*, supra, could have been presented and should have been presented in the first application filed before the supreme court of Kansas in 1935, which were considered in *Cochran v. Simpson*, supra.

It cannot be said that the appellant acted in good faith in omitting to present to the supreme court of Kansas grounds which he urged in 1941 as a basis for a writ of habeas corpus, while the same identical grounds were available in his first application made to this court in

1935. There has been no change in the circumstances which would have precluded a full and complete presentation of all of the grounds for a writ in 1935. The appellant simply was reserving proof for use in attempting to support a later petition if the earlier petitions failed. It is contended by the appellee that such is an abusive use of the writ of habeas corpus.

The appellee is not suggesting the doctrine of *res judicata*, but it is urged that no substantial federal question has been presented.

In *Zucht v. King*, 260 U. S. 174:

> "But although the validity of a law was formally drawn in question, it is our duty to decline jurisdiction whenever it appears that the constitutional question presented is not, and was not at the time of granting the writ, substantial in character." (176.)

The supreme court of Kansas, in the case of *Cochran v. Amrine*, supra, took cognizance of the fact that:

> "In addition to the cases in this court the petitioner has filed in the federal court two petitions for writ of habeas corpus, each of which was dismissed by the court because it failed to present a substantial federal question." (p. 779.)

It must be observed that no appeals were taken from the rulings of the federal court in both instances where the petitions for writ of habeas corpus were dismissed.

The appellee wishes to direct to the attention of this court that the appellant in his application for a writ of certiorari has departed from the record in setting out the reasons for the issuance of the writ. In the brief in support of the petition, allegations are made which are unsubstantiated by the record and which are false and erroneous.

The appellee respectfully contends that the decision of the Kansas supreme court, in the case of *Cochran v. Amrine*, supra, has fully covered the grounds sought to be raised as a basis for the application, and that there is now no substantial federal question involved and the appeal should be dismissed.

MILTON F. AMRINE, Warden of the Kansas State Penitentiary,

By JAY S. PARKER, Attorney General of Kansas,

JAY KYLE, Asst. Att'y General of Kansas,

*Attorneys for Appellee.*

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